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No. 09-129

Supreme Court, U.S.
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In the Supreme Court of the United States

AMERICAN CRYSTAL SUGAR COMPANY,
Petitioner,

v.

THE AMALGAMATED SUGAR COMPANY LLC,
Respondent,

and

THOMAS VILSACK, UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF AMERICAN CRYSTAL SUGAR COMPANY

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CORPORATE DISCLOSURE STATEMENT

Petitioner, American Crystal Sugar Company, incorporates the corporate disclosure statement in its Petition for a Writ of Certiorari.

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INTRODUCTION

Under *Chevron*, an agency decision must be upheld if: (1) the statute at issue is ambiguous; and, (2) the agency's interpretation of the statute is reasonable and consistent with the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984).

The terms "processor" and "permanent termination" are ambiguous as used in the statute and regulations. Since the USDA's interpretation of these terms was reasonable and consistent with the statute, the Ninth Circuit should have deferred to the agency's interpretation as the District Court did.

Instead, the Ninth Circuit decided that the statute was not ambiguous, found that the agency acted unreasonably, and substituted its own interpretation of the statute. Moreover, the Court of Appeals set forth a novel interpretation of how courts should review agency decisions, which, if upheld, would undercut the entire concept of *Chevron* deference.

Respondent tries to distance itself from the Ninth Circuit's discussion of *Chevron* by labeling it mere dicta. But the Ninth Circuit wrote that agency interpretations **"must be subject to greater scrutiny"** in cases of alleged agency self interest. Pet. App. 24. (Emphasis added). Such "greater scrutiny" is not what this Court contemplated in *Chevron*. In fact, the Ninth Circuit did apply greater scrutiny in this case, which is why this Court should grant this Petition.

ARGUMENT

I. The Statute is Ambiguous.

A. The Term "Processor," as Used in the Statutes and Regulations, is Ambiguous.

The term "processor" is not used consistently in the statute and the regulations. The Court of Appeals found the "plain meaning" to be "an entity who processes sugar." While this may seem reasonable in the abstract, such a definition does not fit the statute and the regulations.

The statute uses the term "processor" to refer to, among other things, entities which have been dissolved, permanently terminated operations, or sold all of their assets. 7 U.S.C. § 1359dd(b)(2)(E)-(F). None of these entities would be currently processing sugar and therefore would not fit the Court of Appeals' definition.

Similarly, such entities would not fit the definition of "processor" contained in the regulations. The regulation defines a "processor" as one who produces sugar, has a viable processing facility, and a supply of sugar beets for the applicable year. 7 C.F.R. § 1435.2. A sugar beet processor with a temporary disruption in its facility or crop supply cannot be a "processor" under this definition.

American Crystal's purchase of Pacific's assets has been reviewed at five separate levels. Of these, only the Ninth Circuit concluded that Pacific was not a processor in September 2003 when this purchase took place. The Ninth Circuit disagreed with: the vice president of the CCC, the ALJ (who, like the

Ninth Circuit, ruled against this transaction, but still held that Pacific Northwest was a "processor"), the Judicial Officer, and the District Court. By definition an ambiguous term can be read more than one way by reasonable minds. When such a statutory term can reasonably be construed in more than one way, the Court may not substitute its own interpretation for a reasonable interpretation by the agency.

B. "Permanent Termination" is Also Unclear.

The real question in this case is how to handle a sugar beet processor, like Pacific Northwest, (which had been actively processing sugar from 1998 through early 2001), but had ceased processing. The statute and the regulations do not cover this situation. The question of when a processor's temporary cessation should be deemed to be a permanent termination is left up to the agency. As long as the agency acts reasonably in handling such a situation, consistent with the statute, the courts should not interfere.

Pacific Northwest was obviously in dire financial straits. It had not processed sugar since 2001, had defaulted on its lease, and lost most of its equipment and employees. The company had not given up hope, however. During 2002-2003 Pacific met with most of the leading agricultural companies, including nearly the entire sugar industry, and many other lenders seeking financing and/or a partnership to allow it to resume operations. From the record in this case, one cannot conclude that Pacific had permanently terminated operations. Whether it would have been successful in resuming operations was not the question; instead, as long as the company was still

struggling to survive, it cannot be said to have permanently terminated operations.

As the USDA recognized, the statute provided a mechanism to deal with this situation. If a processor is unable to produce sugar in a given year, the USDA temporarily reassigns the allocations. 7 U.S.C. § 1359ee(b)(2). Pacific Northwest is not the only company which has had such a temporary reassignment. AR, Vol. 5, ACS-35.[1] This mechanism was specifically built into the statute for these purposes.

It was reasonable for the USDA to not immediately remove Pacific's allocation during the first year that the statute was in effect. The USDA did exactly as the statute intended. It closely monitored Pacific's situation to see if the company would survive. Pacific's allocation was redistributed to those in the industry (including Amalgamated) with the need for additional allocation. These companies received Pacific's allocation without charge and benefited enormously from it. (American Crystal did not receive any redistributed allocation during 2002-2003).

These same companies, who benefited from Pacific's allocation, never argued that Pacific was not a processor during 2002-2003. Nor did they claim at the time that Pacific should have been declared permanently terminated. Only after American Crystal spent almost $7 million to purchase Pacific's assets, did Amalgamated complain that Pacific should have been declared permanently terminated.

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[1] "AR" refers to the administrative record.

II. The USDA Acted Reasonably in Interpreting the Act and Managing Pacific Northwest's Situation.

Because Pacific did process sugar in the statutory base period from 1998 through 2000, Pacific earned its initial allocation. The statute required that the USDA grant Pacific its initial allocation of 2.7% of the sugar beet market. 7 U.S.C. § 1359 dd(b)(2)(A).

The first crop year under the Act began in October 2002. After granting Pacific its allocation, the USDA temporarily redistributed the allocation to other companies in the market with excess capacity. The USDA closely watched Pacific's situation during the first year of the Act. The agency received many inquiries from other companies about potential acquisitions of Pacific. Indeed, one USDA official stated that so many companies were interested in acquiring Pacific that he considered putting information about this situation on the USDA website. AR, Vol. 5, ACS-38.

Pacific's situation did not drag out for long. By the summer of 2003 – just nine months into the first crop year – Pacific had reached a tentative agreement with American Crystal. After consulting with American Crystal and Pacific, and carefully analyzing the proposed transaction, the USDA required that the parties restructure the transaction. When the parties complied with the USDA's requirements, the agency approved the transfer of Pacific's allocation. Pacific's growers and creditors benefited from this transaction and some of Pacific's huge debt load was repaid.

III. The Ninth Circuit Failed to Follow *Chevron*.

A. The Ninth Circuit Failed to Defer to the Agency.

In order to avoid *Chevron* deference, the Ninth Circuit substituted its own interpretation of the statute for that of the agency. It disagreed with the vice president of the CCC, the ALJ, the Judicial Officer, and the District Court as to whether Pacific was a processor.

In finding that Pacific should have been declared permanently terminated, the Court ignored both the facts and the law. The Court looked to Pacific's financial distress, but failed to credit Pacific's efforts to try to resume processing. Indeed, Pacific even petitioned the USDA to increase its allocation in 2003. AR, Vol. 5, ACS – 23. The Court of Appeals did not explain why a company that had permanently terminated operations would ask for an increase in its allocation.

The Court also ignored the statute allowing the USDA to temporarily reassign an allocation when a processor is unable to use it. The USDA fully understood Pacific's financial distress. But rather than immediately declaring Pacific to have permanently terminated operations, the agency followed the statute by temporarily reassigning the allocation. The USDA monitored the situation for the next several months while nearly the entire sugar industry negotiated with Pacific. Then, in the summer of 2003 – – less than one year into the new Act – – American Crystal and Pacific negotiated an

asset purchase which brought closure to the situation and benefited Pacific's growers and creditors.

The USDA did not benefit from this transaction. It understood that none of the USDA's loans would be repaid. The USDA did **not** have a self interest in this case. Contrary to the Ninth Circuit's discussion on agency self interest, there was nothing in this transaction that benefited the USDA. Instead, the agency used its expertise to interpret the statute consistent with Congressional intent. The USDA acted reasonably and appropriately.

B. The Ninth Circuit's Self Interest Rule Conflicts with *Chevron*.

The Ninth Circuit did not overturn the District Court merely because it disagreed with the definition of "processor" or "permanent termination." In reading the Ninth Circuit's opinion, one cannot escape the conclusion that the Court believed that the USDA had some kind of self interest at work. It is not a defensible reading of the Ninth Circuit opinion to merely label the Court's discussion of agency self interest as dicta. In its own words, the Court sets forth a new test requiring "greater scrutiny" for agency interpretation in cases of alleged self interest:

> "Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute." Pet. App. 24.

The Court goes on to say that self interest alone does not automatically rebut *Chevron* deference.

However, the Court concludes by saying that deference may be inappropriate if an agency has a self serving interest and the agency's construction is "arguably inconsistent" with Congressional intent. Pet. App. 24. This is the most interesting and the most unsupportable part of the Court's opinion. The Ninth Circuit says that *Chevron* deference may not be appropriate even if an agency's interpretation is arguably consistent with Congressional intent. Because if something is arguably inconsistent, then it is also arguably consistent.

To hold that an agency interpretation that is arguably consistent with Congressional intent is still not subject to deference would completely undercut *Chevron*. The whole point of *Chevron* is that an agency's interpretation should be upheld if it is arguably consistent with Congressional intent. Essentially the Ninth Circuit would allow courts to substitute their own judgment for that of agencies whenever a Court finds that an agency might have a self serving interest at stake. If such a new interpretation of *Chevron* is to be enacted, it is not the job of the Ninth Circuit to do so. This Court should grant this Petition to review the Ninth Circuit's decision which undercuts 25 years worth of precedent under *Chevron*.

Respectfully submitted,

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